UNITED STATES OF AMERICA	)	
	)	**Prosecution Response**
v.	)	
	)	**to Defense Motion to Dismiss All Charges**
Manning, Bradley E.	)	**With Prejudice**
PFC, U.S. Army,	)	
HHC, U.S. Army Garrison,	)	**12 April 2012**
Joint Base Myer-Henderson Hall	)	
Fort Myer, Virginia 22211	)	

RELIEF SOUGHT

The prosecution respectfully requests the Court deny the Defense Motion to Dismiss All Charges with Prejudice (the "Defense Motion") on three grounds: first, the prosecution is in compliance with its discovery obligations; second, even assuming, *arguendo*, an alleged discovery error took place, dismissal of all charges with prejudice is an improper and unjust remedy; and third, there is no legal authority to support dismissal of all charges with prejudice under the facts.

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the Defense bears the burden of persuasion and must prove any factual issues necessary to decide this motion by a preponderance of the evidence. See Manual for Courts-Martial (MCM), United States, Rule for Courts-Martial (RCM) 905(c) (2008).

FACTS

On 3 February 2012, the case was referred to a general court-martial.

On 16 March 2012, the Court issued a Protective Order relating to information in this case.

On 23 March 2012, the Court ordered the prosecution to produce, inspect, or disclose to the Court for *in camera* review materials subject to the Defense's Motion to Compel Discovery. See Enclosure 1. The Court also ordered the prosecution to notify the Court whether it anticipates any government entity subject to the Motion to Compel Discovery will seek limited disclosure of classified information under MRE 505(g)(2) or to claim a privilege under MRE 505(c). See id.

Since early Fall 2010, the prosecution identified the departments, agencies, and military commands whose files it is required to search for discoverable information. See United States v. Williams, 50 M.J. 436, 441 (C.A.A.F. 1999). On or about 25 May 2011, the prosecution began requesting that those specific entities segregate for the prosecution to inspect and preserve any records related to the accused, WikiLeaks, and the evidence in this case. See id., at 441; see also Enclosure 4. Based on reviewing those entities' documents, reviewing new evidence, and any

other reasonable means of learning of new information, the prosecution subsequently developed a good faith basis that additional discoverable files may be located at other departments, agencies, and military commands. The prosecution submitted a further request to those entities to segregate and preserve those records related to the accused, WikiLeaks, and the evidence in this case, or submitted requests to those entities for specific information that is potentially discoverable. In total, the prosecution requested thirteen departments, agencies, and military commands to segregate and preserve such records. Furthermore, the prosecution requested specific information that is potentially discoverable from more than fifty additional departments and agencies. See Enclosure 6, Section V, para. 1(C). The prosecution searched, and continues to search, those files for discoverable information under RCM 701(a)(6) and applicable case law, to include Brady and its progeny.[1]

The prosecution has disclosed all known, unclassified, discoverable information within the possession, custody, or control of military authorities. The prosecution has disclosed all known, classified, discoverable information within the possession, custody, or control of military authorities for which the prosecution has authority to disclose. The prosecution is in the process of disclosing all remaining known, classified, discoverable information within the possession, custody, or control of military authorities for which the issuance of a protective order under Military Rule of Evidence (MRE) 505(g) was required and the classified information privilege will not be invoked. In addition, the prosecution is currently conducting a search of the hard drives subject to the Order relating to the Defense Motion to Compel Discovery and will disclose the results to the defense. See Enclosure 1.

The prosecution has disclosed all known, unclassified, discoverable information outside the possession, custody, or control of military authorities. The prosecution has disclosed all known, classified, discoverable information outside the possession, custody, or control of military authorities for which the prosecution has authority to disclose. The prosecution is in the process of disclosing all remaining known, classified, discoverable information outside the possession, custody, or control of military authorities for which the issuance of a protective order under MRE 505(g) was required and the classified information privilege will not be invoked.

To date, the prosecution has produced 2,729 unclassified documents, totaling 81,273 pages, and 41,550 classified documents, totaling 336,641 pages. See Enclosure 5.

WITNESSES/EVIDENCE

The prosecution does not request any witness be produced for this Motion. The prosecution requests that the Court consider the following enclosures to this Motion in its ruling.

1. Ruling: Defense Motion to Compel Discovery, 23 March 2012 (Appellate Exhibit XXXVI)

[1] The prosecution also continues to notate any potential Jencks or Giglio material contained therein. If the defense requested inspection of those files within the possession, custody, or control of military authorities, RCM 701(a)(2) applies.

2. Defense Reply to Prosecution Response to Defense Motion to Compel Discovery, 13 March 2012 (Appellate Exhibit XXVI)

3. Defense Motion to Dismiss All Charges with Prejudice, 15 March 2012 (Appellate Exhibit XXXI)

4. Enclosure 3 to Prosecution Supplement to Prosecution Proposed Case Calendar, Sample Search and Preservation Request, Defense Intelligence Agency, 25 May 2011 (Appellate Exhibit XII)

5. Transmittal Record, DA Form 200, 15 March 2012

6. Prosecution Supplement to Prosecution Proposed Case Calendar, 8 March 2012 (Appellate Exhibit XII)

7. Prosecution Proposed Case Calendar, 21 February 2012 (Appellate Exhibit I)

LEGAL AUTHORITY AND ARGUMENT

The prosecution requests that the Court deny the Defense Motion on three grounds: first, the prosecution is in compliance with its discovery obligations; second, even assuming, *arguendo*, an alleged discovery error took place, dismissal of all charges with prejudice is an improper and unjust remedy; and third, there is no legal authority to support dismissal of all charges with prejudice under the facts.

I: THE PROSECUTION IS IN COMPLIANCE WITH ITS DISCOVERY OBLIGATIONS.

The prosecution largely agrees with the defense's recitation of the discovery rules in its Reply to the Prosecution Response to the Defense's Motion to Compel Discovery. See Enclosure 2. The prosecution shall permit the defense, upon request, to inspect records "within the possession, custody, or control of military authorities" that are "material to the preparation of the defense" and shall disclose information that reasonable tends to negate guilt, reduce the degree of guilt, or reduce the punishment. RCM 701(a)(2); see also RCM 701(a)(6) (stating that trial counsel shall provide to the defense that which "reasonably tends to negate the guilt of the accused of an offense charged, reduce the degree of guilt of the accused of an offense charged, or reduce the punishment").

The prosecution also bears discovery obligations under Brady and its progeny. See Brady v. Maryland, 373 U.S. 83, 87 (1963). The prosecution shall disclose evidence that is favorable to the accused and material to guilt or punishment. See id., at 87. The prosecution shall *always* produce Brady evidence. See Skinner v. Switzer, 131 S.Ct. 1289, 1292 (2011) (noting that Brady "announced a constitutional requirement addressed to the prosecution's conduct pretrial"); see also Pennsylvania v. Ritchie, 480 U.S. 39, 59 (1987) (stating that "it is the [government] that decides which information must be disclosed" under Brady).

The accused's charged misconduct, significant in both volume and substance, caused a widespread government response, spanning multiple Executive Branch departments, agencies, and military commands. See Enclosure 6. The facts set forth in this Motion outline those steps the prosecution undertook, and continues to undertake, to satisfy its discovery obligations, in light of the accused's charged misconduct.

The prosecution has, and will continue to, mirror the open file discovery system as much as practicable, taking into consideration the national security concerns relating to that which may be discoverable. See RCM 701(a) analysis ("[M]ilitary discovery practice has been quite liberal."); see also UCMJ art. 46 (2008) ("The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe."). To date, the prosecution has produced 2,729 unclassified documents, totaling 81,273 pages, and 41,550 classified documents, totaling 336,641 pages. See Enclosure 5. Much of the information, discoverable or not, is owned by other government agencies and may contain multiple equity holders, requiring interagency coordination. See Enclosure 6. The prosecution will continue to coordinate expeditiously with those entities to ensure the accused receives a speedy and fair trial.

The defense alleges that the prosecution has committed discovery violations, to include a violation of Brady and RCM 701(a)(2). See Enclosure 3. The three components of a discovery violation are as follows: first, that the evidence is discoverable; second, that the evidence was suppressed by the government; and third, that prejudice ensued. See Strickler v. Greene, 527 U.S. 263, 282 (1999) (listing elements for a Brady violation). No such violation exists because the prosecution has not suppressed discoverable information, but rather the Government required a military judge to regulate discovery under RCM 701 and MRE 505 and to enforce reasonable protective measures before authorizing further disclosure or inspection of classified information in light of national security concerns. This is evidenced by the original Prosecution Proposed Case Calendar where the prosecution outlined for the Court and the defense how much time it anticipates is needed to review voluminous classified material and be able to present much of this material to the Court under MRE 505 in a systematic and efficient process. See Enclosure 7. The Court's recent rulings with respect to discovery and the protective order limit foreseeable risks to national security, thus satisfying those measures necessary to obtain approval for disclosure or inspection.

II: EVEN ASSUMING, *ARGUENDO*, AN ALLEGED DISCOVERY ERROR TOOK PLACE, DISMISSAL OF ALL CHARGES WITH PREJUDICE WOULD BE AN IMPROPER AND UNJUST REMEDY.

Even assuming, *arguendo*, the Court finds error in discovery, dismissal of all charges with prejudice would be an unjust and improper result. Military courts have long held that dismissal is a drastic remedy. See United States v. Cooper, 35 M.J. 417, 422 (C.M.A. 1992) ("[E]ven where there have been allegations of flagrant and persistent prosecutorial misconduct...a[n] [appellate] court should not mandate automatic reversal without regard to the prejudicial impact of the misconduct."). Appellate courts first determine whether alternative remedies are available, short of dismissal. See id., at 422; see also United States v. Edmond, 63 M.J. 343, 345 (C.A.A.F. 2006) (noting that appellate courts "look[] at the fairness of the trial and not the culpability of the prosecutor"). Trial courts should follow this same approach. Here, administrative procedures under the rules, to include those already adopted by the Court, will cure any alleged defect that may have possibly prejudiced the accused.

The Court has adopted one such procedure, an *in camera* review under RCM 701(g)(2), which can also act as a remedy. On 23 March 2012, the Court ordered the prosecution to produce information subject to the Motion to Compel Discovery for *in camera* review to determine what, if anything, is subject to discovery or inspection. See Enclosure 1. This review ensures all discoverable information is produced.[2]

Furthermore, dismissal of all charges with prejudice would be improper and unjust because the prosecution is in a position to cure any possible prejudice to the accused, particularly in light of its ongoing search for discoverable information given the volume and substance of the accused's charged misconduct. As explained above, the prosecution promptly requested all government entities whose files the prosecution is required to search under Williams to segregate and *preserve* any records related to the accused, WikiLeaks, and the evidence in this case. See Enclosure 4. Those entities continue to preserve such records.[3] Ordering the prosecution to adopt alternative discovery procedures in its continuous review of these preserved records, a task the prosecution will expeditiously pursue if ordered, is another remedy available to the Court, short of dismissal.[4]

III: THERE IS NO LEGAL AUTHORITY TO SUPPORT DISMISSAL OF ALL CHARGES WITH PREJUDICE UNDER THE FACTS.

There is no legal authority to support dismissal of all charges with prejudice *before* the court-martial commences under these facts. The defense argues RCM 701(g)(3)(D) provides the Court with this implicit authority, yet provides no authority supporting its conclusion. The defense relies upon the rulings in Vigil, an Air Force Court of Criminal Appeals case, and Fletcher, a Court of Appeals for the Armed Forces (CAAF) case, to conclude that a trial court has the implicit power to dismiss charges with prejudice for alleged discovery violations during pretrial motions practice. See Vigil v. Bower, 1996 WL 233211 (A.F. Ct. Crim. App. 1996); see also United States v. Fletcher, 62 M.J. 175, 178 (C.A.A.F. 2005).

In Vigil, the appellant pled guilty to an Article 112a offense and was sentenced to a dismissal and confinement for four months. See Vigil, 1996 WL 233211. *After trial*, the defense learned of exculpatory evidence which the Government did not provide the defense. The military judge conducted a post-trial hearing wherein the military judge found that "this information, if provided to the defense, would have had a high probability of causing a different result." Id., at 1. The military judge concluded that a new trial would be "adequate to protect [the appellant's] rights," while not giving him "an unwarranted windfall." Id. The appellant

---

[2] As stated in the preceding section, the prosecution has anticipated, since before referral, presenting much of this material to the Court in a systematic and efficient process, which is what the Court has ordered, but on an accelerated timeline, based on the defense's evidentiary motions being filed prior to arraignment.

[3] The purpose of this search and preserve request was two-fold; first, to ensure the prosecution complies with its obligations under Williams; and second, to ensure that no evidence is lost or destroyed.

[4] Accomplishing this task will not take "another two years" as suggested by the defense; to the contrary, the prosecution expeditiously continues to conduct its Williams search of such voluminous information, both classified and unclassified. The prosecution has already produced in discovery a total of 44,279 documents, consisting of 417,914 pages, even though referral took place on 3 February 2012. See RCM 701(g).

filed a petition for extraordinary relief to reverse the military judge's ruling and dismiss all charges with prejudice. The Court denied this petition. See id. This case provides no precedent for dismissal of all charges. Rather, this case serves as precedent for a court to order a new trial on the merits when the defense learns of discoverable information that the Government failed to disclose to the defense. Here, those facts do not exist.

In Fletcher, the appellant was tried and sentenced to one month confinement for a violation of Article 112a. See Fletcher, 62 M.J. at 175. The CAAF found that the trial counsel engaged in prosecutorial misconduct at trial by making improper arguments and that such misconduct prejudiced the appellant. See id., at 178 ("While prosecutorial misconduct does not automatically require a new trial or the dismissal of the charges against the accused, relief will be granted if the trial counsel's misconduct 'actually impacted on a substantial right of an accused (i.e., resulted in prejudice).") (citing United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996)). The CAAF reversed the findings and sentence. This case provides no precedent for dismissal of all charges *before* the court-martial commences, but rather serves as precedent when alleged prosecutorial misconduct transpired at court to the prejudice of an appellant. Here, those facts do not exist.

Dismissal of all charges with prejudice would be an unjust result because the defense has provided no factual basis to support its argument. The defense alleges that the prosecution engaged in "willful" or "grossly negligent" prosecutorial misconduct. See Enclosure 3. Prosecutorial misconduct is "action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." Meek, 44 M.J. at 5. The defense cites cases whereby appellate courts concluded that prosecutors wrongfully and completely withheld from the defense either exculpatory evidence, otherwise discoverable information inconsistent with its theory of the case, or other discoverable information to gain a "tactical advantage." See United States v. Charles, 40 M.J. 414 (C.M.A. 1994) (the appellate court found error where trial counsel failed to disclose impeachment information relating to key government witness); see also United States v. Koubriti, 336 F. Supp. 2d 676 (6th Cir. 2004) (discussing how federal prosecutors wrongfully failed to disclose documents "which were clearly and materially exculpatory" because such documents were inconsistent with their view of the case). The defense argues the prosecution is "deliberately withholding Brady material" without providing a factual basis.[5] See Enclosure 3. To the contrary, the prosecution has, and will continue to, produce Brady material to the defense as soon as possible. See Enclosure 7 (the prosecution originally requested classified procedures under MRE 505 to take place in Phase 1 for "Immediate Action" under a systematic method to produce classified information post-referral). The prosecution has not withheld discoverable information, but rather the Government required a military judge to regulate discovery under RCM 701 and MRE 505 and to enforce reasonable protective measures, such as a protective order, before authorizing further disclosure or inspection of sensitive unclassified and classified information in light of ongoing criminal investigations and national security concerns. The Court's recent rulings with respect to discovery and the protective order limit foreseeable risks to

[5] The only information that the prosecution has yet to disclose to the defense is classified documents for which the classified information privilege may be invoked and/or reasonable protective measures needed to be taken, or information the prosecution does not consider discoverable under any applicable statute, rule, or case, such as work product.

national security, thus satisfying those measures necessary to obtain approval for disclosure or inspection.

The defense argues that the prosecution adopted incorrect discovery standards in conducting its search under Williams. See Enclosure 3. To the contrary, as stated on the record and as provided above, the prosecution continues its search for discoverable information under Williams and will produce that which the rules of discovery under RCM 701 or the Court require.

CONCLUSION

Based on the above, the prosecution requests that the Court deny Defense Motion to Dismiss All Charges with Prejudice on three grounds: first, the prosecution is in compliance with its discovery obligations; second, even assuming, *arguendo*, an alleged discovery violation took place, dismissal of all charges with prejudice is an improper and unjust remedy; and third, there is no legal authority to support dismissal of all charges with prejudice under the facts.

ASHDEN FEIN
MAJ, JA
Trial Counsel

JODEAN MORROW
CPT, JA
Assistant Trial Counsel

ANGEL OVERGAARD
CPT, JA
Assistant Trial Counsel

J. HUNTER WHYTE
CPT, JA
Assistant Trial Counsel

I certify that I served or caused to be served a true copy of the above on Mr. David E. Coombs, Civilian Defense Counsel, via electronic mail, on 12 April 2012.

J. HUNTER WHYTE
CPT, JA
Assistant Trial Counsel